
SIGILLVM · VNIVERSITATIS · CALIFORNIENSIS
LVX
FIAT
MDCCCLXVIII
EX LIBRIS

THE RELATION OF CUSTOM TO LAW.

BY

GILBERT T. SADLER

M.A. (OXON), LL.B. (LOND.).

LONDON:

SWEET & MAXWELL, LIMITED,

3 CHANCERY LANE, W.C. 2.

1919.

PRINTED BY
THE EASTERN PRESS, LIMITED,
LONDON AND READING.

PREFACE.

THE subject of this thesis has not often been specially dealt with, and the references to it, by many writers, are vague and confusing. The use of the phrase "customary law," by such jurists as Sir Henry Maine, has not helped to give light, but rather the reverse. Yet the theme is one which goes to the very centre of jurisprudence, as the science of law in States.

The elucidation and illustration of the relation of custom to law may help to make jurisprudence more fascinating even than before.

Whatever changes may come in modern States, in the way of giving up some aspects of their independence and sovereignty, so as to form a federation of States, this story of how custom arose and was recognised (or not) as law must be of perennial interest.

G. T. S.

CONTENTS.

CASES TO WHICH REFERENCES ARE MADE.

THE RELATION OF CUSTOM TO LAW

EXPOSITION OF TERMS.

CUSTOM.

"*Custom is unwritten law peculiar to particular localities*" (*a*).

THIS is the *strict* sense of "Custom," as immemorial local custom. But in this thesis the word is used to cover trade usages and the law merchant before such are recognised by the State, and whether they be recognised or not. Customs, existing in a State, and which will be recognised, are already law. Both terms apply to such customs. Customs that will not be recognised are customs only, and not laws. Customs may be general common law before they are openly recognised, and after they are recognised. Or customs may be particular

(*a*) *The Laws of England*, The Earl of Halsbury, X. 218. *Lockwood* v. *Wood* (1844), 6 Q. B. 50 Ex. Ch.

customs, or they may be already part of the law merchant, before or after they are recognised by the State.

The present essay seeks to deal with *all* such customs, to mark out which are laws already, because they will be recognised by the State; and to show how all such customs arise and how they become laws. Not all customs are or will be laws. The term "custom" is used herein not merely in the strict sense but in the wide sense to include usages of trade, and the usages behind the law merchant, and general customs over a country.

"The men who first drew, accepted and indorsed a bill of exchange did as much for the law as any lawyer has ever accomplished. They may or may not have acted on the advice of jurists: but whether or not, they began a practice which grew into custom, and as such was recognised by the tribunals as a law-creating one, one conferring rights and imposing obligations. There is much of this, far more probably than is commonly imagined, in the history of every system of law" (*b*).

Custom is, in the *broad* sense, all the social rules which are observed by the bulk of the members of a society—be it a clan or a nation—as well as the rules which pertain to a locality or to a trade.

(*b*) J. Muirhead, *Historical Introduction to the Private Law of Rome* (1916, p. 233).

LAW.

By law, in this thesis, is meant State Law. Laws are (1) customs in a State which will be, or have been, recognised by the State; and (2) Statutes which the State has promulgated.

Austin declared that law meant positive law, *i.e.* general commands set by a Sovereign to the members of an independent political society (*c*).

It has often been pointed out, however, that not all laws are commands. Austin himself indicated some laws that are not commands, viz. laws to explain laws, and laws to repeal laws, and laws of imperfect obligation. Nevertheless, the criticisms on Austin's definition of laws, as general commands, are not of so great value as they appear at first to be. For the laws that are not general commands are mostly incidental to those that are such. A better term than commands, however, is the word "rules" in defining a "law." Again, not all laws are "set" by a sovereign. Customs that will be recognised by a judge are already laws, and are not "set" by the sovereign.

Hence Dr. Holland's definition is to be preferred to Austin's: viz. that Positive Law consists of *rules* "*enforced* by a sovereign political authority" (*d*). The State has two parts, the Sovereign and the Subject, and a law

(*c*) *Lectures on Jurisprudence*, Lecture VI.
(*d*) *Jurisprudence* (1916), p. 43.

is a rule which the sovereign enforces by sanctions. The law need not be a general command, nor need it be deliberately "set" by the sovereign: but always it is a rule enforced by the sovereign.

Some customs are so enforced, or if brought into a Court they will be so enforced: they are then already laws: but not *all* customs are laws. If they exist in a State, and will be, or are, enforced by the sovereign political authority, they are laws. Outside of a State there are no laws, only customs. A State must needs have a number of men: more than a few families or clans. Rousseau suggested 10,000 people could form a State, but that number is too small, though in the Middle Ages such small States existed with dignity. But such States were in danger of being conquered and hence arose large unities. There must be a fixed territory. A nomadic people are not a State. There must be a unity, or cohesion of the people, an internal organisation.

Each State has a distinction between sovereign and subjects. The sovereign need not command or "set" all laws, but he enforces them. Anarchy cannot give a State.

The State is an organism (*e*), body and soul, organisation and life. It is not a lifeless formation, but it can grow. It acts, and makes

(*e*) J. K. Bluntschli, *The Theory of the State* (English translation, p. 19).

changes within itself, and has ideas. It is not, however, a separate conscious person, though there have been some German writers who have tried to uphold this (*f*).

A law is thus a rule which can be enforced by the State's coercive power. A State may exist by conquest, as by the Norman William I., or by the work of a leader who gathers peoples together against some common enemy, as when Saul arose in Canaan and unified the tribes against the Philistines (*g*). Or a State may arise by the voluntary association of tribes, as in Ancient Rome, if tradition is to be believed: or of peoples spread over a large area, as in the United States of America. But in all cases a State is characterised by a central authority or sovereign. The people make an implied contract — not an express contract, as Hobbes and Rousseau seemed to declare — to associate together for self-defence and for internal peace. The central power acts for these ends by laws which it enforces, and whose enforcement the people, as a whole, generally believe in and accept. Some social customs become laws in the State, *i.e.*, are enforced by the central authority.

For Maine to declare that because in a half-civilised, tax-collecting Empire in the East, the ruler Ranjeet Singh did not set or alter the customs which yet were obeyed in his State,

(*f*) *Idem*, pp. 22, 23. (*g*) 1 Samuel ix.

does not affect the question: because, as Maine himself indicates, those people were not governed by *positive* laws. Austin's distinction between positive laws and other laws still holds good. Indeed, Maine seems to have accepted Austin's analysis (*h*), and spoke of it as a "scientific process." Austin dealt with States of an advanced civilisation, and not with primitive societies which had no central coercive government. In a State, law exists if the State will enforce it, and if customs are taken up into the State thus, or will be taken up (should occasion to refer to them arise), these and only these customs are law. There is no such thing as Customary Law as distinct from State Law. Customary Law is State Law as derived from customs. The distinction is clear between customs in a State which the State will not enforce, and those it will enforce. The latter are customs which are *also* laws.

Maine acknowledged that the amount of force used in primitive societies was exceedingly small, "inconceivably small" (*i*). He distinguishes between "customary law" (in such a society) and "enacted law."

But his terms here introduce a confusion. For if these be in a primitive society, "immemorial

(*h*) *Early History of Institutions*, p. 343. See W. Markby, *Elements of Law*, pp. 6-8.

(*i*) *Idem*, p. 392.

Custom *blindly* obeyed," as he says, why use the word "law" of these customs at all?

When he further acknowledges that there is practically no force used as a sanction in such societies, the use of the word "law" for the rules which in primitive societies are generally observed, becomes still less necessary. Its use approaches nigh to the use of "law" in the phrase a "law of nature," where a mere blind uniformity is meant. It is best then to confine the term "law" to the rules in a State which the State will enforce. There is a clear, if not rigid, distinction to be made between a primitive society obeying its customs, and a State in which laws are enforced. These laws may be (literally) written or unwritten: but all the rules that are enforceable in a State are its laws.

Lewis H. Morgan distinguished clearly between the grouping of "gentes" and the political State. He shows how in the former custom prevailed. "The obligation of blood revenge, which was turned at a later day into a duty of prosecuting the murderer before the legal tribunals, rested primarily upon the gens of the slain person" (*k*).

Before the period of the Homeric poems (about 850 B.C.), the Asiatic Greeks lived in groups of gentes, but moved from gentile to political society, till there came the laws of

(*k*) *Ancient Society* (1877), p. 238.

Drace (624 B.C.), Solon (594 B.C.) and Cleisthenes (509 B.C.). The social system of barbarism was founded upon kinship; hence the gentes, with customs of electing chiefs, descent to the male line, mutual help and redress of injuries, adoption of strangers.

So "the growth of the idea of government among the American aborigines commenced with the gens and ended with the confederacy. Their organisations were social and not political. Until the idea of property had advanced very far beyond the point they had attained, the substitution of political for gentile society was impossible" (*l*).

Where, then, the organisation is merely instinctive without any central coercive force enforcing the customs, there is no State as yet, and no law: but when a State is reached, all customs which it *will* enforce are among its laws.

In the growth of Customs, and their movement into laws, the general order has been—(a) the habits of the people; (b) the formation thus of a custom; (c) the declaration of the custom by a sub-State authority, and (d) last, the recognition by the State that customs bearing certain marks are laws. Thus, in regard to India, Markby wrote (*m*), "Custom is a less direct instrument of charge than legislation, and it

(*l*) *Idem*, p. 214.

(*m*) *An Introduction to Hindu and Mohammedan Law*, by Sir William Markby (1906), p. 14.

operates more slowly and secretly, but its operation is very extensive, especially in the earlier stages of legal history. . . . Thus we find in the Laws of Manu (*n*), that it is specially ordered that the King who knows the sacred law must *inquire* into the laws of castes, of districts, of guilds, and of families, and *thus settle* the peculiar law of each (*o*). . . . Looking over long periods of time, we can see that under the influence of Custom vast changes have taken place, which, *originating in the habits* of the people, have gradually come to be recognised as law."

(*n*) See *Sacred Books of the East*, XXV., Book 8, V. 41, 46.

(*o*) This proceeding is rather the work of the sub-State leader or authority than the work of a sovereign in a civilised State, such as was accomplished by the English.

I.

The Cause of Customs in the Instincts of Man, interpreted by Reason.

Behind Customs are the instincts of men, interpreted by reason, that is, by the analytic and sympathetic power of man's mind.

Such instincts are three, viz., the instinct of self-preservation, the instinct of sex and parentage, and the growing instinct of sympathy, *i.e.*, compassion for those who suffer, or a desire to be fair to the needs of others.

Reason interprets these instincts, and customs are developed to express them. Thus the instinct of *self-preservation* led to the rules for reprisals between individuals and between States. The blood-feud, "bot" and "wer," the rule of distress for a debt, such arose because of the desire for self-defence or self-preservation.

Customs of marriage arose from the *sex-instinct*, as interpreted by reason; and customs of succession for the property to be kept in the family arose from the instinct of parentage.

The instinct of *sympathy* is a secondary result of the mind, a growth, but it has been a real

power in the formation of customs, some of which have been later recognised as laws, as in those customs which uphold fair play and justice, and faithfulness to one's word solemnly given.

Instincts, interpreted by reason, may thus be said to have created custom.

The custom of primogeniture arose in Continental Feudalism—being taken over from the barbarians—because of the desire of the lord to have one person, clearly defined, to whom he could look for his feudal dues; and who better than the eldest son? But in England other customs had arisen which were allowed by the Normans to continue as local particular customs, such as borough English in the district of Nottingham, wherein descent was to the youngest son, perhaps because he was longest in the home and least able to care for himself (*a*): and gavelkind in Kent, wherein descent was to all the male heirs, that all might have a share in the estate.

Such customs of descent (and those also in other lands) arise from the family-instinct, interpreted by man's reason.

There was thus a latent tendency towards laws in the people themselves, and not only in their semi-official or official leaders. Before ever such leaders "declared the law," it had gradually arisen in customs which themselves had come from the instinctive needs of men for some form

(*a*) Holdsworth, *History of English Law*, III. 236.

of marriage, land-tenure, compensation for injuries ("bot"), succession to the dead, the use of barter, and funeral rites (*b*).

(i) Many jurists have tried to pierce the customs of peoples to find their cause in some mental phenomenon, but not always with success. Gustav Hugo (1768-1844) wrote *Lehrbuch des Naturrechts als einer Philosophie des positiven Rechts* (1809). Law, he declared, was formed in customs, outside legislation, both in Rome and in England. It arises from manners. The positive written law tried to make exact the order of customs which existed previous to the positive law.

F. C. von Savigny (1779-1861) was influenced by Hugo's work. He wrote *Vom Beruf unser Zeit für Gesetzgebung und Rechtswissenschaft* (1814), a pamphlet, and his *System* (1840). Law, said Savigny, is the product of a people's genius (Volksgeist). The law concerning a family, or private property, exists in the general will to have families and private property. "Custom is not a source of law, but evidence of it." This, surely, is a use of the term "law" that is not to be justified, a confusion, in fact.

(*b*) The use of the term "instinct" here is in its wider connotation, such as is adopted by Mr. MacDougall in *Social Psychology*, chap. III., where the list of instincts includes the instinct of pugnacity, the gregarious instinct, the sexual instinct, the acquisitive instinct. Such lie behind those habits in which customs arise. See G. F. Stout, *Manual of Psychology*, pp. 362-364.

Savigny wrote: "What are the grounds of the origin of common law, or in what do the law-sources consist? In the general consciousness of a people lives positive law, and hence we have to call it people's law. It is the spirit of a people, living and working in common, in all the individuals, which gives birth to positive law. We acknowledge an invisible origin of positive law. A proof of this lies in the universal, uniform recognition of positive law, and in the feeling of inner necessity with which its conception is accomplished. This feeling expresses itself in the primæval assertion of the divine origin of law or statutes. . . ."

"Wherever men live together, in this natural whole is the seat of the generation of law. What works in an individual people is the general human spirit, which reveals itself in that people in a particular manner. . . . Custom is the badge and not a ground of the origin of positive law. . . . The ancient German institution of village courts (Schöffengerichte) which were composed of skilled persons, rested upon a state of immediate recognition of the customary law. The knowledge of customary laws is not required from the judge: they are like foreign laws. The party must allege and prove them."

It may be questioned whether Savigny is right in his hypothesis of a "general human spirit." There are simply instincts in common, which instincts have come up from the lower

animals by evolution, but are modified in men by reason, self-conscious thought which analyses and synthesises. Savigny went too far in assuming that "law" lay in men's minds. Law was gradually developed by the instincts in men's minds, as these were helped by reason to express themselves, and thence gradually customs arose.

G. F. Puchta (1798-1846) was a disciple of Savigny and his successor at Berlin in 1842. He wrote *Encyclopädie* (1825), and *Das Gewohnheitsrecht*, on customary law (1828). He declared that law is from the "general will," and the State only expresses that will. A system of law was a revelation of spiritual life.

"Two guides have been given to man by which the tendency to individualistic separation is guided, viz., Love and the sense of Right." "Right is the *common will* of persons." "Justitia est constans et perpetua voluntas jus suum cuique tribuendi," as Justinian said. Thus Puchta sought to show that right does not arise from custom, but the reverse is the truth. "Usage is only the last fact of the process by which the right which has arisen and is living in the members of the people externalises and embodies itself." The right is known by usage, not created by it. "The usage will possess the required condition (to be recognised by a judge as a right) whenever it can be shown to be the outcome of a common conviction of the people."

That common conviction is seen in "longa consuetudo" (oft-repeated immemorial custom), and in its being in accord with divine commandments.

So Arndts, in *Encyklopädie,* "Customary law is law by virtue of its own nature, as an expression of the general consciousness of rights."

So Windscheid, in *Pandektenrecht,* "The ultimate source of all positive law is national reason."

The truth in these writers is, as above indicated, that customs arise from the mental life of man exercised on his natural or acquired instincts. But these writers tend to attribute such instincts to some "general will," as if there were a will greater than all the individual wills of men, a special will for *each* separate society. There may well be a vast World-Will behind and below all wills, but to speak of *each* society or nation having a common will is an assumption such as Rousseau made, but one which cannot be proved.

Dr. N. Falck (born 1784), a professor in Christiania, in his *Encyclopädie,* declared that "Custom becomes a law through the common will. It only *continues* to exist by the will of the legislative power." This writer also assumes a "common will," whereas there can only be a general consent to each custom. Such a general agreement on this or that custom is not a metaphysical entity or substance called a "will."

General consent does not make a law. It only makes a custom. The legislative power, as Dr. Falck showed, can alter the custom or abolish it. But more than that, that power can refuse to recognise a custom as law at all. Not all customs become laws. Hence the custom does not become a law through any mythical "common will." It only becomes a law if it attains certain marks (set out below) by which it *will* be recognised by the State, or if it be already recognised. On attaining those marks (as ancient and reasonable) it becomes law, because the State recognises (or will recognise) such a custom. This mythical idea of a "common will" as making customs into laws is set out also in the writings of T. H. Green (*c*).

The idea of a common good undoubtedly exists —in varying degrees—in many people in a State: but so different are the ideas in people that it cannot be said to be a common will. The State is not a person. It has no "general will" (*d*) as a distinct metaphysical substance, such as Green spoke of. Rousseau assumed rather than proved the existence of a *volonté générale*. The members of Parliament in Britain may be elected by hardly half the number of those possessing the franchise, and by far less than half the population. Such an imaginary "will" cannot

(*c*) *Lectures on the Principles of Political Obligation*, in his *Works*, Vol. II.

(*d*) Page 409.

make laws from customs, except by "recognition" or by Statutes.

(ii) Coming from the *writers* who more or less try to indicate the background of custom to historical *illustrations* of the existence of such a psychical source of custom, there are two phenomena in history which help to unveil this source of custom.

(a) *Jus naturale in Roman jurists.*

Some writers have tended to confuse *jus naturale* with *jus gentium*, relying on the saying of Gaius that *jus gentium* was by *naturalis ratio* (*e*). But in that declaration Gaius never mentioned *jus naturale*, far less identified it with the *jus gentium*. Rather he said that the *jus gentium* was caused by the reason in all men. The *jus naturale* is a term, then, larger than *jus gentium*. Much in the latter comes from the former. The former consists of some instincts set out by reason. The latter consists of rules which actual peoples made or adopted, and which were recognised by the Roman praetors.

Slavery was not allowed by the *jus naturale*, but it was in the *jus gentium*, in the rules of all the peoples around Rome. The Romans themselves made slaves of many whom they captured in war: 30,000 were sent from Tarentum to Rome, and 150,000 Epirots from Greece. Ulpian

(*e*) *Institutes*, I., 1. *Jus gentium* is that which *naturalis ratio inter omnes homines constituit.*

declared slavery was *non jure naturali; quia quod ad jus naturale attinet, omnes æquales sunt* (*f*).

Florentinus, after Gaius, declared *servitus est contra naturam.*

Thus it is possible to see a distinction between *jus gentium* and *jus naturale* without going so far as to declare with Ulpian that natural law is in the animals, viz., in their instinct of sex-union (*g*). Such an instinct is not one modified by reason or self-consciousness as in men: and it is by such modification that it gives rise to custom (*h*). Dr. Moyle has indicated the time when the Stoic doctrine of *jus naturale* came to be a power in Rome (*i*).

"Greece became a Roman province in the middle of the second century before Christ, but her philosophers were as yet regarded at Rome with dislike and suspicion, and in B.C. 161 their teachers had been expelled from the city. Stoicism was first raised to full influence in the higher ranks of Roman society by means of the group which gathered round Scipio Æmilianus, who died B.C. 129; and Quintus M. Scaevola, consul in B.C. 95, and the founder of scientific

(*f*) *Digesta* of Justinian, L. 17. 32.

(*g*) *Digesta*, I. 1. 1., par. 3.

(*h*) For a metaphysical examination into the difference between the instincts in man and the animals, see T. H. Green, *Prolegomena to Ethics*, pp. 83, 84.

(*i*) *Imperatoris Justiniani Institutionum Libri Quattuor* (1903), p. 37.

jurisprudence, was one of its earliest eminent disciples. We may believe from the last-mentioned date onward its doctrines were applied to the development of law with consistency and success. . . . The edict of the praetor peregrinus had been in existence and applied to citizens in their relations with foreigners for more than a century and a half."

Thus the *jus gentium* (rules common to peoples around Rome and accepted by the praetor) had been in Rome before the ideas of the *jus naturale* came to be distinctly recognised: but those ideas in the minds of peoples around Rome preceded the *jus gentium* really, and ran down into primitive human instincts. For, as Isidore wrote (*k*):

"Jus naturale est commune omnium nationum, eo quod ubique *instinctu* nationum, non constitutione aliqua habetur: ut viri ac feminae conjunctio, liberorum successio ac educatio."

So Paulus wrote (*l*):

"Id quod semper æquum ac bonum est, jus dicitur, ut est jus naturale."

James Bryce has written on Cicero's view of jus naturale (*m*), and also shows it is to be distinguished from *jus gentium*.

"Cicero, though he would not have described himself as a Stoic, subsequently adopts their

(*k*) *Orig* V. 4. 1.
(*l*) *Digesta*, I. 1. 11.
(*m*) *Studies in History and Jurisprudence*, II. 137.

language on this point, and lays great stress on Nature as the source of the highest law and morality, invoking the doctrine in his speeches as well as expounding it in his treatises (*n*). With him, the law of Nature springs from God, is inborn in all men, is older than all the ages, is everywhere the same, cannot be in any wise altered or repealed. It is the *basis of all morality*. It ought to prescribe the provisions of positive law far more extensively than it in fact does, and to give that law a higher and more truly moral character. We might expect Cicero to go on, if not to identify it with the *jus gentium*, which he contrasts with the peculiar law of Rome, at any rate to describe it as the source and parent of *jus gentium*. This, however, he does not actually do, though more than once he comes near it. *Jus gentium* is, to him, a part of positive law, though much wider in its range than *jus civile*: whereas the law of Nature is altogether an ethereal thing, eternal, unchangeable, needing no human authority to support it, in fact it is St. Paul's 'law written on the hearts of men.' "

It will be clear from these passages that *jus naturale* is *not* to be confused with *jus gentium*, and the words of Henry Maine cannot be indorsed:

(*n*) *De Republica*, fragment preserved by Lactantius, *Div. Inst.* VI. 8. 7.

"The *jus naturale* is simply the *jus gentium* seen in the light of a peculiar theory" (*o*). The *jus naturale* was the instinct of sympathy which reason worked up into principles of life. What were the principles wrapped up in the *jus naturale*?

Voigt set them forth (*p*) as the following:

(a) The claims of blood;

(b) Faithfulness to engagements;

(c) Equitable apportionment of advantage and loss, so that one person was not enriched by the unfair loss of another;

(d) Supremacy of *voluntatis ratio*, the recognition of intention instead of merely dealing with the words or forms used.

Such *jus naturale*, Voigt showed, is applicable to all men, in all ages, and is in accord with an *innate conviction of right* (innere Rechtsüberzeugung).

The *jus naturale*, as Dr. Muirhead points out (*q*), meant "a higher ideal," to which the Stoics strove. The *jus civile* was for *cives*. The *jus gentium* was for the freemen of all nationalities. The *jus naturale* was for mankind.

(*o*) *Ancient Law*, chapter III.

(*p*) Moritz Voigt (Leipzig)—in *Die Lehre vom jus naturale æquum et bonum und jus gentium* (1856 : 4 vols.)—traces (in Vol. I.) the idea of *jus naturale* in the Greek philosophers (Socrates, Plato, Aristotle, and the Stoics) and in Cicero; and further, in Roman Law (Gaius, Paulus, Marcian, Justinian).

(*q*) *The Private Law of Rome*, p. 272.

By the *jus naturale* the higher, nobler customs arose among men, and laws were altered thereby: *e.g.*, the custom of allowing a son to have a *peculium*, and then a *peculium castrense*. These allowances by the father arose from the spirit in the *jus naturale* spreading in Roman society. Such customs were gradually recognised by law (*r*). The old *patriapotestas* arose as a custom—"quum jus potestatis moribus sit receptum" (*s*). The father had the power of life and death over the son. But by the growth of the *jus naturale* in men it came to be felt a thing of shame that a father should kill or sell his son.

"You are guilty of an unlawful and *disgraceful* act, that you sold your freeborn children" (*t*). It was disgraceful before it became illegal. Customs changed as leniency increased, and what was leniency but the principle in the *jus naturale*, even though not called by that name? and "the latter periods of Roman law present a gradual emancipation of *filius familias* by successive inventions of new kinds of peculium" (*u*).

So with slaves. They had been often cruelly treated in the Republic; some were exposed, some

(*r*) Constantine made a law concerning *peculium quasi castrense*. See Ortolan, *History of Roman Law*, p. 312.

(*s*) *Digesta*, I. 6. 8.

(*t*) Cod. VII. 16. 1.

(*u*) E. Poste on Gaius: *Institutiones*, p. 65.

slept in private prisons, some were chained together to work in the fields. Many who revolted were crucified.

But Seneca, who was influenced by the idea of the *jus naturale*, taught that slaves had the dignity of men. Such a sentiment came not from Christianity, but from the Stoics of Greece. Seneca said that masters who ill-treated their slaves were pointed at in the streets and blamed (*x*). Thus the *custom* of ill-treatment was changed by the *jus naturale*. Then law appeared, and Claudius declared that masters were not to kill their slaves. He destroyed the *ergastula*, or private prisons. Antoninus Pius made a law that a master who ill-treated his slave could be compelled to sell him.

For centuries the working of the *jus naturale* affected the customs, and so gradually the laws, of Rome.

(b) Grotius indicated in his *De jure belli et pacis* (*y*) that certain customs of natural law would be adopted as International Law (*jus gentium*). Such natural law he called *jus naturæ*. "Let us see what is allowed by natural law (natura). . . . If I cannot otherwise preserve my life, I may, by any force which I can use, repel him who assails it; this arises from the right which nature gives me for *my own*

(*x*) *De Clem.*, 1. 18.

(*y*) Edition published by John W. Parker, Cambridge Press, 1853, Vol. III., cap. I.

preservation. Further, I may take possession of a thing belonging to another, from which a certain danger impends over me, without consideration of another's fault. So by natural law (*naturaliter*) I have a right to take from another a thing of mine which he detains . . . and the like I may do for the sake of recovering a debt. So when punishment is just, all force is just without which punishment cannot be attained. . . . So Plato approves a war carried on till those who are guilty are compelled to undergo penalties to the satisfaction of the innocent who suffer by it (*z*). In order to recover what is ours, if we cannot take exactly so much, we have a right to take more. . . . From these general rules we may see what is lawful against an enemy by natural law."

As to the trade of neutrals during war, Grotius makes three lists of articles of commerce:

"There are some articles of supply which are useful in war only, as arms: others which are of no use in war (sunt quæ in bellow nullum habent usum), but are only luxuries (voluptates); others which are useful both in war, and out of war, as money, provisions, ships and their furniture. . . . In the third class, objects of ambiguous use (usus ancipitis), the state of war is to be considered. For if I cannot *defend myself*, except by intercepting what is sent,

(*z*) *De Rep.* V. p. 471. B.

necessity gives us a right to intercept it, but under the obligation of restitution, except there be cause to the contrary. . . . We have referred this question (of contraband) to Natural law (jus naturæ) because we have not been able to find in history anything on the subject as determined by instituted law (constitutum jure voluntario gentium esse)."

Further, "in war, force and terror may be used (vis ac terror), by natural law, so also deceit (dolus) in certain cases." But Grotius confessed that he knew that "some of the kinds of fraud (fraudium) which we have said are allowed by natural law (naturaliter), have been repudiated by some people."

Under Caput II., Grotius distinguished the *jus gentium* from the *jus naturæ*, in regard to what was allowed in war. Thus, it is clear that the common sense of man (in a lower stage of morals from what he is able to reach) has declared for defence of himself and his property by any means needed for such, even unto reprisals: and indeed such a will is at the foundation of the ethics of modern International Law, which for self-defence allows reprisals, both in peace and war, and on this is based the international "rights" of pacific blockade, angary, embargo, and the seizure of contraband. So far as these rights are now recognised by law-making treaties, such as the Hague Conventions of 1899 and 1907, it is possible to see how customs

arise and pass into laws. They arise by the common desires of men in society, and by general consent they pass into agreements between States, and give rise to International Laws. Here, in the *jus naturæ* are reached, then, some of the instincts which created custom. It is evident that by *jus naturæ* Grotius did not indicate the ideals of fair play, justice, and equity which were hidden in the *jus naturale* of the Stoics. The *jus naturæ* was rather the self-regarding instincts of men.

Such self-regarding instincts have played a large part in the production of customs which later were recognised by States as inter-State (called International) Law. The custom of seizing contraband from neutrals, of reprisals in self-defence, of angary arise from these self-regarding instincts.

Other customs in Inter-State Law (recognised by the Hague Conventions) arise from the instinct of sympathy such as the granting of days of grace to enemy merchant ships found in harbour at the outbreak of a war, or the right allowed to coasting fishing boats to be immune from capture as long as they were not used for any warlike purpose.

Thus is is evident that instinct lies *behind* many of the customs now allowed as laws between States.

II

Customs which arose from the repeated Acts of a People, some of which Customs attained to the Marks by which they were later called Laws.

Customs have arisen in two ways: either by a people repeating certain acts (as the use of a footpath) till they become habitual, or by some popular authority making decisions on cases voluntarily brought before him. It is convenient to separate these two occasions, but in history they are often connected. For the popular authority, the popular leader to whom appeal is made, interprets the customs which exist among the people. In his breast lies the custom. He forms a link between the loosely organised tribe and the highly organised State with its central coercive Government. But, in interpreting the custom, the popular arbitrator often slightly alters it, and so makes a new custom. Maine thought that such decisions originally created the customs of a people, but only rarely can it have been so. The arbitrator

modified customs very gradually, but repetition of acts (arising from instinct) was the primary source of the main body of the customs of a people.

Historical examples of such customs may be given.

(a) CUSTOMS OF SELF-HELP IN ANCIENT ROME.

The Laws of the Twelve Tables (B.C. 451) point to a previous period in which the rules adopted in that Code were largely acted on as customs among the Roman people.

The debtor was dragged by the creditors before a voluntary arbitrator. This was so even in the time of the kings, who did not interfere unless a riot was likely to occur. If the debtor refused to pay the debt which the arbitrator decided was due, the creditors would put the debtor in chains. A thief, if a slave, caught red-handed (*furtum manifestum*), was often killed: if a freeman was caught red-handed the custom was for the payment of four-fold the value of the article stolen: if caught when he had deposited the article custom decreed that two-fold its value should be paid. Such customs were recognised in the Laws of the Twelve Tables, but no doubt they grew up gradually from the instincts of self-preservation, which were very strong among the Romans. Similarly, the *lex talionis* was observed, barter

was a custom, as was the transfer of an article or house as a pledge for a debt (*fiducia*), and the reconveyance of the same if the debt was paid. The contract of *mutuum* was very ancient, being at times solemnised by an oath before the statue of Hercules in Rome.

Other customs which grew up prior to the Code were *patria potestas*, the succession to *sui heredes*, *adrogatio* to keep up the *familia*, and slavery.

Well might Tacitus speak of kings who persuaded rather than commanded men. Such customs rested on the social sanction of exclusion from society, or on a sanction of self-help, as in the case of a thief or debtor. In Rome, laws could even be repealed by the "tacit disuse of the people" (*a*).

(b) CUSTOMS OF SUCCESSION IN INDIA.

Before the Brahmin priests modified customs by their decisions, there grew up in India native customs from the instincts (self-regarding or sympathetic) as directed by reason.

John D. Mayne, in *Hindu Law and Usage*, wrote:

"My view is that Hindu Law is based upon immemorial customs, which existed *prior to and independent of Brahminism*, and that, when the

(*a*) *Digesta*, I. 3. 32. 1.

Aryans penetrated into India they found there a number of usages . . . and accepted these. . . . The religious element subsequently grew up and distorted the legal conceptions" (*b*).

Brahminism did not create the customs of the undivided family (a group of families), the order of succession, and the practice of adoption.

It was from repeated acts of the people in their village communities that these immemorial customs arose.

(c) CUSTOMS BEHIND THE LAW MERCHANT.

The law merchant is a definite body of law ruling *mercatores et marinarii*. The law once was administered in local courts. Thus the Statute of the Staple (*c*) and the Carta Mercatoria (*d*) declare that the Court is to be of merchants and strangers (foreigners). The law merchant was part of the Common Law of England: the judges took notice of it: it was *jus gentium* (*e*).

Such law merchant was no doubt influenced by Roman Law, for "the four consensual Roman contracts cover most of the field of mercantile

(*b*) *Hindu Law and Usage*, pp. 4-6.
(*c*) 27 Edw. III. st. 2.
(*d*) 31 Edw. I.
(*e*) *Mogadara* v. *Holt*, Show. 31.

law" (*f*), and the Court of Admiralty used Roman Law to some extent.

But before the rules of merchants were recognised by the State they existed as customs which had grown up to satisfy the natural instincts of self-preservation and acquisition in merchants. Thus, one of the needs of merchants is haste. They cannot stay for long formalities of conveyance. Hence arose the negotiability of bills of exchange, the sale in market overt, the customs of factors to give a valid title to a third party. All such came to be recognised by law and enforced by the State, but the social sanction of merchants "enforced" such at first.

Thus, bills of exchange "to bearer" go back to 1379, when they were mentioned. The early "bills" were promissory notes. In 1704, a Statute of Anne made clear the difference between an order to pay (*i.e.* a bill of exchange) and a promise to pay (*i.e.* a promissory note).

Lord Mansfield helped to settle the law in many cases (1756-1788).

It was the repetition of early acts among merchants that gave rise to their customs, before the State stepped in to recognise and enforce such customs as the "law merchant."

So with the usages of the mariners of the

(*f*) A. C. Carter, *English Legal Institutions*: and see *Digesta* XIX. 2. 13; XIV. 21: XXII. 2. as to bottomry and general average.

Atlantic. A collection of such came to be arranged as the Oléron Code of sea laws, later given in *Les Us et Coutumes de la Mer* (Bordeaux 1647), confirmed by the Roll of 12 Edward III. The Code was made about 1150, by Eleanor, daughter of the Duke of Aquitaine (Oléron being the isle on the West of France included in Aquitaine). The Code, or "lex et consuetudo de Oleron," is set out in *The Black Book of the Admiralty*, and in *Liber Horn* (from the name of a man who died in 1328 in London), which are in the archives of the Guildhall, London. In the Code are given the judgments as to the powers of masters to sell merchants' goods to pay necessary expenses, how to act in shipwreck, sickness, collisions, and the rules concerning pilots.

It is evidence that the Code is founded, as it says, on the *usages* of merchants long established by repetition. Behind the law lay the customs. This becomes even more clear in regard to the sea laws of Visby (Wisby), collected in a Code at Lübeck about 1240. It gives the customs of the mariners of the North Sea and Baltic and often in versions of it says: "These rules the shippers and merchants have resolved *among themselves*."

There is a real distinction between custom and law, but when the custom attains certain marks the State practically has to recognise it, if the State would govern men, and keep the peace among those who for long have observed the

custom (*g*). A custom existing in a State, which the State will enforce or has already recognised, is a law.

(d) CUSTOMS IN EARLY ENGLISH LIFE.

Lists of fines (wergild, bot) were drawn up by Ethelbert, Ine, and Alfred, and called "Dooms." Such were to be paid by any one who had committed murder, or theft, or assault. "A thegn had a wergild six times as great as a ceorl." There was no formal contract and no imprisonment in connection with such compensations. These fines were fixed by the people themselves, and by repetition became customs. The Courts of freemen only declared such customs.

So we read of a case in 1072 at Penenden Heath, when a special County Court was held. "Lanfranc recovered certain lands of the see of Canterbury from Odo," and the Bishop of Chichester, "a very old man and most learned in the laws of the land," was "brought to the court in a wagon (*in una quadriga*) by the King's command to discuss and *explain* the ancient legal customs" (*h*).

(*g*) See *The Black Book of the Admiralty*, edited by Sir Travers Twiss, 4 vols. (1871). The Laws of Oléron are in Vol. I. The Laws of Wisby are partly identical with the Laws of Oléron.

(*h*) Pollock, *The Expansion of the Common Law*, p. 37, quoting the *Textus Roffensis*.

Magna Charta was practically the beginning of enacted law in England. Then came the Provisions of Merton (1236) and of Marlborough (1267). The King was below the law, as Bracton said. Henry III. did not "set" the law. "No one thought the King could alter the common law of the Catholic Church" (*i*). The *consuetudo* of the borough was the *lex* of the borough, and sometimes it was committed to writing. Gradually the Common Law, drawn from Dane law and Mercian law and Wessex law, prevailed, though Kent had a Lex Kentiae (as in gavelkind). The customs by long repetition had grown up, and were respected and obeyed. The manorial court interpreted rather than "set" the customs, but by interpretation often added new points to the customs. The Courts expounded the customs, which, by being ancient and reasonable, were law already, being tacitly recognised by the State, and would be openly recognised if occasion demanded. An example will illustrate this.

"In 1223, Richard of Beseville and Joan his wife brought an assize of novel disseisin against Peter of Goldington and thirty-six others for land in Ravensthorpe." They all agreed that Richard and Joan held the tenement, but should not have cultivated it that year: it should have lain fallow: when Richard and Joan cultivated

(*i*) Maitland & Pollock, *History of English Law*, I. chap. VII.

it, Peter and the others pastured their beasts on the corn when it had sprouted. Richard and Joan did not deny the custom, but sought the judgment of the Court. "And therefore it is considered that the said Richard and Joan remain in their seizin, and that Peter and the others be in mercy" (*k*).

In all these cases it is possible to discern the growth of custom by *repetition* of what seemed reasonable among a people.

(*k*) Maitland & Pollock, *History of English Law*, II., chap. III.

III.

Customs which arose from the Decisions of Popular Authorities, some of which Customs acquired the Marks of Law.

By popular authorities are meant leaders who, from their manifest learning in the customs of a society, are looked to spontaneously by a people as voluntary judges or arbitrators or guides. These leaders are not appointed from above, by the Government of a State, but recognised from below, by the people. They may act in a State, an immature State, as arbitrators were voluntarily chosen in Rome, in the time of the "Kings." Such kings were not sovereigns so much as leaders probably. They did not interfere with the customs of the people unless such customs led to riots. Generally, however, such popular authorities have acted in societies which have had no central coercive authority, societies which were not yet States in the modern acceptation of the term. They were, anyhow, sub-State authorities, whether existing in a State or not: and while they seemed to only *declare* the customs they really added to such, or altered such gradually, as also did "case-law" in civilised States.

This will become apparent by examples, from which also it will be clear that the rules which were altered or added to (as well as declared) by these authorities were rules chiefly concerned with the order of succession, or the amount of compensation ("bot"), or the customary method of "distress" for debt.

Such matters were not always settled by habitual repetitions of certain acts by a people. They often needed some "wise man" to choose between alternatives or decide a course in new cases, as well as declare what had been customary in past cases.

(a) THE BRAHMIN PRIESTS.

The sources of Hindu Law, according to Mayne (*a*), are texts and decisions on the one hand, and customary law on the other. Such custom must be ancient and continuous, and not be opposed to morality (as in the case of dancing girls' contracts), if the British Courts are now to recognise it. The Law of Manu said that "immemorial usage is transcendent law." So the British Judicial Committee declared that "clear proof of usage (in India) will outweigh the written text of the law." Indeed, as will be seen later, the British judge practically must

(*a*) Mayne, *Hindu Law*.

recognise ancient and revered customs, if he is to rule the people, and to keep the peace.

Mayne shows that "immemorial customs" existed before the Brahmin priests: but these priests modified them. "On the one hand, while I think Brahmanical law has been principally founded on non-Brahmanical custom, so I have little doubt that those customs have been *largely modified and supplemented* by that law."

These priests were hardly State authorities. By their religious power over the people they were revered as authorities. They tinged the native usages with their own views on the family, on the order of succession, or on the adoption of a son.

Thus the Brahmins did not make State law, but made new customs: yet those customs gradually ceased to be new, and as they had, or took on, marks of being certain and ancient, they became law in that any State had to recognise them retrospectively, as the British have done.

(b) THE ROMAN SACERDOTES.

Hunter, in his work on Roman Law (*b*), wrote:

"At the time of the Twelve Tables (451 B.C.) the State did not as yet claim to decide civil disputes, although it sanctioned the use of force to bring an alleged wrongdoer before the

(*b*) *Roman Law*, pp. 967, 974.

tribunals. At an *earlier period*, as we may infer from the peculiarities of the oldest form of legal procedure—the *sacramentum*—even this limited authority was denied. The earliest type of judicial proceedings was a mock combat, followed by a reference to arbitration. The first judges were simply arbitrators. Civil jurisdiction sprang out of arbitration. The coercive authority of the State grew out of the *voluntary submission* of the subject. That is the keynote to the history of civil procedure in Rome. . . . The authority of the State in civil matters was first established when a defendant was *not* allowed to refuse arbitration."

It was by the pontiffs that the customs were made known in the time of the "Kings." Indeed they acted under the kings, then under the consuls, and lastly under the praetors.

"Their science of law was (*c*) closely bound up with their science of religion and astronomy. Theirs was the knowledge of the *jus sacrum* and the calendar; they alone could tell the *dies fasti* and *nefasti*, *i.e.*, the days on which an action at law might or might not be commenced. The knowledge and control and development of the *formulæ* relating to the *legis actiones* and to juristic acts came to rest entirely with them. The *early* legal opinions of the College of Pontiffs, which formed the *basis* and norm of

(*c*) R. Sohm, *Institutes of Roman Law*, pp. 88, 89.

the existing practice, were preserved in the archives of the pontifices, and to these archives none but members of the college had access. The pontifical jurisprudence came to be regarded as a secret science."

Thus, in the earliest times the customs were not strictly law but were rules which the pontiffs held secretly. The people trusted them because of the religious awe in which these pontiffs were held. They were not State appointed (though allowed by the kings), but popular authorities who declared the rules of customs which the people obeyed. The Code of the Twelve Tables made known some of these customs, and recognised them as law; but more customs lay behind, in the secrets of the pontiffs. Cicero has indicated this pontifical law in two passages in *De legibus*, which passages indicate laws which were in the Twelve Tables.

"Let no one bury or burn a dead man in the city" (*d*).

"Whoso shall have his teeth joined with gold, and one shall bury or burn him with it, let that be without prejudice" (*e*).

The early use of the terms *sacra* and *sacer* shows how the priests gave decisions and produced customs. The *sacra* or religious rites of a god

(*d*) *De legibus*, II. 23, par. 58. "Hominis mortuom, inquit lex in XII., in urbe ne sepelito neve urito."

(*e*) *De legibus*, II. 24. par. 60. "Cui auro dentes juncti esunt, ast im cum illo sepeliet uretue, se fraude esto."

or goddess (as Minerva) were in each family carried out according to the rules of the priests.

Marriage was arranged according to the sacred laws, and a man and woman shared all things (*confarreatio*). The priests sought pure-blooded descendants to perpetuate the *sacra*. If there were no son to succeed, the *paterfamilias* was told to "arrogate" one out of another family.

An outlaw was *sacer homo*, devoted to a god, and for that god he could be killed by anyone.

For other offences, a man could be killed as a sacrifice to the infernal Dis. Plutarch (*f*) declared that a man who sold his wife *sacer esto*. Servius Tullus is said to have written (*ff*):

"It was provided in the laws of Numa, that if any had unintentionally killed a man, he should present for the life of the slain man, a ram in public meeting (*contio*)"—*Contio* was a meeting called by a magistrate or priest. Thus the priest would get a victim for a sacrifice.

It is clear that Roman Law originated not by the commands of a sovereign but by the rules of the priests, who were respected (or feared) by the people, as in many primitive societies. Custom was largely what the priests declared. Such custom even applied to the land:

"He who ploughed up a land-mark should be devoted to the gods, himself and his oxen" (*g*).

(*f*) *Romulus*, 32.
(*ff*) Ecl. 4. 43. See E. C. Clark, *Early Roman Law* (1872).
(*g*) Dionysius, *Antiqq.* II. 74, attributed to Numa. It was

So also the *actio sacramentum* seems to have been originally a consecration of copper to priestly purposes: and if the king took it, it would be as *pontifex maximus* (*h*). Hence it has been well said that there was "very little legal system" during the monarchy in Rome (*i*).

The *Digesta* of Justinian (*k*) witnesses to the power of the pontiffs.

"The Statute of the Twelve Tables was passed. These tables gave rise to the civil law, and in accordance with the same were devised the Statute actions (legis actiones). But in connection with all these Statutes, the knowledge of the way to interpret them, and the conduct of actions founded on them, was left to the College of Pontiffs, and it was laid down, by order, which of these should superintend private causes every year: and the people continued to conform to this usage for about 100 years. Afterwards, Appius Claudius, having propounded and reduced to form the actions above mentioned, Gnæus Flavius, his secretary, the son of a freedman, purloined the book, and put it in the hands of the people at large. It was called the Flavian Civil Law."

customary for historians to refer their oldest customs to the "Kings."

(*h*) See E. C. Clark, Roman Private Law, pp. 89-91, 100.

(*i*) J. S. Reid, Litt.D., *A Companion to Latin Studies*, p. 301.

(*k*) *Idem.* 2.

(c) PATERFAMILIAS IN ROME.

Another popular authority in ancient Rome was the *paterfamilias*.

There can be no doubt that the heads of families largely influenced the production of custom, for they were the proprietors of wives, slaves, children, freedmen. Their decisions would be generally respected and obeyed.

(d) THE BREHONS IN IRELAND.

Dr. P. W. Joyce has described the ancient system in Ireland in these words:

"The native legal system existed in its fulness before the 9th century. It continued till finally abolished in the beginning of the 17th century. In Ireland, a judge was called a brehon (Irish, brethren), whence the native Irish Law is commonly known as the Brehon Law, but its proper designation is Fénechas, the law of the Féine or free land-tillers.

"The brehons had absolutely in their hands the interpretation of the laws and the application of them to individual cases. They were a very influential class of men, and those attached to chiefs had free lands. Those not so attached lived simply on the fees of their profession. The legal rules as set forth in the law-books were commonly very complicated. The brehon's fee was one-twelfth of the property in dispute, or of the fine in an action for damages. . . . There is no record of *how* the brehons acquired

the exclusive right to interpret the laws, and to arbitrate between litigants: it grew up gradually and came down *as a custom* from times beyond the reach of history. The legal processes in which they took part strongly resembled the procedures in archaic Roman law.

"In very early times, the brehon was regarded as a mysterious, half-inspired person.

"The brehons had collections of the law in volumes or tracts, all in the Irish language, by which they regulated their judgments. The two largest are the Senchus Mór and the Book of Aicill. The Senchus Mór is chiefly concerned with the Irish civil law, and the Book of Aicill with criminal law and personal injuries" (*l*). No doubt the Senchus Mór was produced by a Committee appointed by Laegaire, King of Ireland, about 436 A.D.

It contained the Laws of Distress (as the law of "fasting" on a debtor), the Cain Law (*e.g.*, as to foster-age), and the *Corus Bescna*, or law of obligations (contracts, and also of status).

But the Code contained no new laws: it was a Digest of those in use, with the Scriptural and Canon laws. The Book of Aicill contained opinions of Cormac and Cenfaeludh (about 227—266 A.D.). It was a list of the compensations to be given for injuries: *cf.* Anglo-Saxon "bot."

(*l*) *A Social History of Ancient Ireland*, 2 vols. (1903), I. chap. VI.

The brehons were not exactly a State Department. They were a professional class by force of *custom* (*m*).

Henry Maine said of the ancient brehons:

"The brehon law had not acquired yet, or very imperfectly acquired, that binding power which law obtains when the State exerts the public force through Courts of justice to compel obedience to it" (*n*).

The brehons expounded old customs and rules from the Bible, and added thereto by their decisions on new cases. They were a sub-State authority. "Ireland never arrived at (*i.e.*, so early) the legislative stage: no distinct legislative machinery existed. The internecine wars rendered it impossible for any supreme King to command sufficient power, so that the central government was never strong enough to have much influence, either in the making of laws or in causing the existing laws to be carried out. . . . The brehon laws, then, are really *not a legislative structure*, but merely a collection of customs, attaining the force of law by long usage, customs which were thrown into shape and committed to writing by a class of professional lawyers or brehons. And a similar growth and development of custom-law took place in the early stages of all the Aryan

(*m*) L. Ginnell, *The Brehon Laws*, pp. 81-86.
(*n*) *Early Institutions*, p. 50.

nations" (*o*). *Both* of the terms "law" and "customary law" apply to a rule which has "attained force of law" by attaining to those marks by which it *will* be recognised as law by the State in which it exists, should occasion arise.

(e) THE EARLY DEEMSTERS IN THE ISLE OF MAN.

From early times up to 1270 the Isle of Man had Scandinavian kings. Later it had Scottish and English kings. But laws were "breast laws," *i.e.*, written in the breasts of the deemsters, or judges.

In 1614 Speed wrote of Ireland:

"All controversies are there determined by certain judges . . . and these they call deemsters, and *chuse forth among themselves*" (*p*). They were popular authorities. A. W. Moore (*q*) says the word "deemster" means doom-steerers. A salary of £7 10s. used to be paid by the State to deemsters, and this was raised in 1645 to £15. But the deemsters were the *people's officials*, and as late as 1577 were *elected by the people* from among themselves. They were looked upon as being the repositories of the customs and traditions which

(*o*) P. W. Joyce, *A Social History of Ancient Ireland*, I. chap. VI.

(*p*) Theat. *Gt. Brit.* 46.

(*q*) *History of the Isle of Man*, 2 vols., pp. 744-746.

constituted the Common Law, and their *opinions* upon them were considered as authoritative."

About 1422 the customs were reduced to writing, but the "breast-law" still continued.

The earlier deemsters were clearly, then, sub-State authorities, popularly elected or recognised. It is possible to perceive how they would declare customs, and add new rules by their decisions. Those rules which became ancient and certain and reasonable were law if existing in a State, with a central coercive government, for they would be recognised, on occasion, retrospectively as well as prospectively, as law. The time when a custom becomes law is not, as Austin said, the time when a judge recognises it; it is the time (only vaguely to be ascertained) when, in a State, it acquires certain marks (to be hereafter discussed) by which it must needs be recognised as law, should occasion arise.

(f) THE CHIEFTAINS OF THE ORKNEY ISLES.

The Orkneyinga Saga (*r*) tells of the chieftain who offered his services to prevent further bloodshed, and tried to "lay down terms of atonement." Wherever the *Lex Talionis* held sway disputes arose as to the amount of compensation, and appeals were made to some wise man or elder who knew what was customary or could

(*r*) Section 27.

decide in a new case (*s*). The chieftain, in ancient Orkney Isles, was not appointed by a sovereign to be judge. His mediation was offered to or requested by the people: it could be refused, and then trial by battle ensued.

So concerning Normandy, M. Tardif tells of the chief's mediation in mediaeval times, of his fee, and how no compensation could be had for some wrongs (*t*).

In the 12th century, in the Orkneys, the earl received some payment by those concerned in a blood-feud: but customary compensation to the relatives of a murdered man was still given (*u*).

(g) THE LAW-SAY-MAN IN ICELAND.

Viscount Bryce in his *Studies in History and Jurisprudence* (I.) has described the Althing of ancient Iceland. It was a voluntary annual assembly of the nation, having first met in 930 A.D. It elected an officer called the law-say-man, who declared the common law. The Althing met yearly till 1800. It was originally formed by the deliberate purpose of men seeking law and justice.

The Law-speaker was not a judge appointed by a State. He delivered no State judgments.

(*s*) See *Ancient Laws of Ireland* (6 vols.).
(*t*) *Le Très Ancien Coutumier de Normandie*, chap. 86.
(*u*) *Records of the Earldom of Orkney*, by J. S. Clouston.

He declared rules which all accepted. There was no King and no executive to carry out the rules declared. The people recognised their own customs and obeyed them.

* * * * * *

In all these cases it is clear that customs have generally been voiced by some popular leader who gradually *added* new customs by his decisions. Some of these were later recognised by the State to be laws.

IV.

The State recognition of some Customs as Laws, because of certain Marks which these Customs bear.

Austin declared that a custom became a law when it was recognised by a judge of the State. But if it was *recognised* as law it must have been law already: *e.g.*, in an agreement based on some particular local custom, or on a custom existing behind the law merchant, the recognition is retrospective, for it goes back to the time when the agreement was made, and recognises that the agreement was legal, was one which could be legally enforced by the State, was a contract. Consequently customs which *will be* recognised by a judge are already law, and are so because they bear certain marks. Austin's words are as follows:

"The prevalence of a custom amongst the governed may determine the sovereign, or some political superior in a state of subjection to the sovereign, to transmute the custom into positive law. Respect for a law-writer whose works have gotten reputation, may determine the legislator

or judge to adopt his opinions, or to turn the speculative conclusions of a private man into actually binding rules. The prevalence of a practice amongst private practitioners of the law, may determine the legislators or judge to impart the force of law to the practice which they observe spontaneously. Now, *till* the legislator or judge impress them with the character of law, the custom is nothing more than a rule of positive morality; the conclusions are the speculative conclusions of a private or unauthorised writer; and the practice is the spontaneous practice of private practitioners. . . . The custom is transmuted into positive law *when* it is adopted as such by the courts of justice, and when the judicial decisions fashioned upon it are enforced by the power of the State. But before it is adopted by the courts, and clothed with the legal sanction, it is merely a rule of positive morality (*a*). John W. Salmond has, however, clearly put the truth of the matter in these words:

"Custom is law not because it *has been* recognised by the courts, but because it *will be* so recognised, in accordance with fixed rules of law, if the occasion arises. . . . The Austinian theory forgets that the operation of custom is determined by fixed legal principles" (*b*).

(*a*) *Jurisprudence*, I. 37, 104.
(*b*) *Idem*, p. 157.

The recognition or ratification of customs as laws of State is not a matter of caprice. The judge is guided by certain principles which have grown up in history, by the existence of certain marks or characteristics in the custom. It is these which lead the judge to recognise it as law, and to recognise that it *was* law when the agreement, for example, or decease of the intestate, took place. The following points, therefore, need to be noted.

(a) It must be clearly borne in mind that not *all* customs become laws. Customs, as such, are not, therefore, to be called "Customary laws." This is a confusion which occurs in many writers. Customary law is part of law.

(b) It must be further clearly recognised that Judges practically *must* recognise some customs as laws, if a people are to be governed, and a revolution be prevented.

(c) Further, it must be perceived that why some customs are recognised is because they already bear certain marks or characteristics as ancient and reasonable.

(d) Last, it is necessary to see that recognition of a custom as law, by the State authority, is retrospective: just as the ratification of an act of an agent, done for the principal (he being in existence at the time) is a retrospective act of the principal. So that *a custom is also a law of a State* (1) *if the State has come into existence, with its central coercive sovereign power, and*

(2) *if the custom bears the marks by which it will be, or is, recognised by a judge of that State.* When the State exists, all customs in its social life (general or local customs), which the State will enforce, *are* also laws. Before the State exists, there are no laws (even if customs be called "customary laws" by some writers); there are only customs. For a law to exist there must be possible the State enforcement of the rule, should it need to be enforced in any instance.

These four points will emerge more clearly in the instances given below. But a few words may be added upon the second point, as to why the judge recognised a custom as law if it bore certain marks. The deep yet clear reason for the whole process seems to have escaped the notice of many juristic writers. The reason is a *practical* one, the need of governing a people in peace. Recognition or ratification by a judge is not to be thought of as a purely arbitrary proceeding. He is a servant of the State, which exists to keep the peace, within and without. Hence the judge *must*, in a sense, recognise some customs, if order is to be preserved. Customs which the people hold as sacred or essential to their life, or reasonable, must be recognised as law by the judge, and his recognition is retrospective: *i.e.*, if the custom has attained certain marks he must and will recognise it as having been law in the past even. Sovereignty (in which a judge shares) is never absolute. The Courts

do not merely belong to the sovereign, but to the people. The sovereign power is held in by the exigencies of the need of keeping the peace. The sovereign fears a popular rising, public opinion, even perhaps assassination, and "strikes" against the carrying out of a law. To keep the peace a sovereign must give scope to many of the customs the people use: not to all, but to those which bear certain marks by which the people regard them as sacred or essential to their lives. Sir Henry Maine wrote of the judge in India: "A nervous fear of altering native custom has, ever since the terrible events of 1857, taken possession of Indian administrators. . . . What an Oriental is really attached to is his local custom" (*c*), for such custom "sprang from a common social necessity" (*d*).

So Dr. Vinogradoff has said in regard to India:

"It would be the grossest travesty of justice if English judges in considering the customs were guided solely by European conceptions of right and wrong. The jurisprudence of the Medical Committee of the Privy Council affords many signal instances of a respectful treatment of foreign popular customs. In a case of 1906—*Musammat Lali* v. *Murli Dhar* (*e*)—the question at issue was one of disputed succession. The

(*c*) *Village Communities*, p. 39.
(*d*) *Idem*, p. 65.
(*e*) 22 T. L. R. 460.

respondent claimed the property under a will in a wajib-ul-arz, which was legal evidence which an English Court was *bound* to consider" (*f*).

The relation of Custom to Law is the relation of popular rules to some of such rules which when they come to bear certain marks are then laws, and are later retrospectively recognised, or will be ratified by the State, as laws: and this recognition occurs because practically thereby the State can better secure the keeping of the peace. The matter is illustrated in regard to King Alfred's collection of "Dooms" (*g*). Alfred declared that he *dared not* add many rules of his own. The King's recognition of general customs as laws was what he had to recognise very largely if he was to rule at all. He gathered "those things which me *met with*, that seemed rightest."

The various codes of "Dooms"—largely lists of compensations ("bot" and "wer") which it was customary to pay for injuries to persons—were not arbitrary codes. If the people were to be contented, they must needs be given their usual reprisals or penalties. The aim was not to educate them to bear injuries without any such reprisals or injuries inflicted in return. The aim was to keep the peace among a half-civilised people.

(*f*) Paul Vinogradoff, *Common Sense in Law*, pp. 161, 162.
(*g*) *Cf.* Seebohm, *Tribal Customs in Anglo-Saxon Law.*

EXAMPLES OF THE STATE-RECOGNITION OF CUSTOMS.

(a) IN ROMAN LAW.

The Twelve Tables (451 B.C.) recognised many customs as law, such as these:

"The agnate shall succeed" (after the *sui heredes*).

"A dead body shall not be buried or burned within the city."

"Whoso shall write a libel shall be beaten to death with clubs."

"A son sold thrice by the *paterfamilias* shall be free."

The *prætor peregrinus* (from about 242 B.C.) recognised many customs existing among the peoples who came into touch with Rome. The *jus civile* was thus moulded by "tacit consuetude" (*h*). The freedom with which a stipulation was made among the peoples of Italy, Sicily, and Sardinia was recognised as legal by the prætor, instead of his requiring the Roman's formal words "*dare spondes? spondeo.*"

Julian (*i*), writing about the time of Hadrian, declared:

(*h*) J. Muirhead, *Private Law of Rome.*

(*i*) *Digesta*, Book 84: some MSS. say 94. "Inveterata consuetudo pro lege non immerito custoditur. Et hoc est jus quod dicitur, moribus constitutum. Nam quum ipsae leges nulla alia ex causa nos teneant, quam quod judicio populi receptae sunt, merito et ea, quae sine ullo scripto populus probavit tenebunt omnes. Nam quid interest, populus suffragio voluntatem suam declaret, an rebus ipsis et factis?"

"Ancient custom may well be held to be law. Such is law set up by customs. For since the statutes themselves for no other cause bind us, than that they were accepted by the judgment of the people, so also what laws the people approved, without any writing, bind us all. For what does it matter whether the people express their will by vote or by deeds and conduct?" This passage is quoted in Justinian's *Digesta* (*k*), being followed by words from Ulpian and Hermogenianus which bear on the subject of the relation of custom to law.

Ulpian: "It should first be asked:
Has the custom ever been confirmed (firmata sit) by a judicial sentence delivered after objections were heard?"

Hermogenianus: "Rules of Law which have the sanction of long-established custom (longa consuetudine), and have been kept up for a great number of years, may be treated as the subject of a *tacit agreement* (tacita conventio) by the citizens."

Thus customs had to attain the mark of being ancient ere they became law, and they then became law by the tacit consent of the sovereign *comitia*, or (in the later Empire) of the Emperor as representing the people. This is not all clearly stated in the *Digesta*, but seems to be implied.

(*k*) I. 3. 32-40.

Another mark which customs of Roman *Cives* had to have in order to have "the force of law" (*l*) was that they must not be opposed to *reason* (*m*).

In the Middle Ages, Bartolus, a Post-glossator, declared that custom contrary to divine or natural law or to the Law of Nations was not to be observed as law. Such were a custom's negative marks.

> "Concludo quod aut conseutudo est contra legum aut praeter legum. Primo casu consuetudo est contra jus naturale, et non debet servari aut contra legem divinam, et idem facit. . . . Aut contra jus gentium, et idem . . . aut est contra jus civile" (*n*).

Bartolus declared that a custom must positively have these three marks if it was to be law:

> "longum tempus,"
> "tacitus consensus populi,"
> "frequentia actuum."

It is thus possible to trace in Roman Law and in the Middle Ages the idea that custom attaining or having originally certain marks became law in a State.

(*l*) *Digesta*, I. 3. 33.
(*m*) *Code*, 1. 14. 2.
(*n*) Comment on *Codex*, Part II. p. 333, par. 45 (*C. VIII.* 53. 2). Bartolus was born in 1314 at Sassoferrato and became Professor at Pisa University, 1339. He died about 1357 (so Savigny says).

(b) IN ENGLISH LAW.

Blackstone in his *Commentaries* (*o*) sets out what he calls "unwritten" (*p*) (non-statutory) law. It has three parts.

(1) General customs, or the Common Law properly so called: *i.e.*, customs existing generally over the land. They are universal and ancient. They are "evidenced" by judicial decisions. They deal with such matters as inheritance, contracts, property, wills, torts, crimes. Thus that the eldest son is heir in intestacy, that property can be acquired by writing, that a deed is invalid unless signed and sealed, that breaking the peace will be punished by a fine or imprisonment—such are general customs.

(2) Particular or local customs, as gavelkind, borough English, and the customs of London. There are several marks that these must have if they are to be recognised as law by judges.

(3) Particular laws, as the Roman civil law and the canon law, used in certain courts.

(*o*) *Commentaries on the Laws of England*, 2 vols., with Barron Field's Analysis (Philadelphia), I. pp. 68-79.

(*p*) This is not Austin's legal sense of "unwritten," by which Austin meant a law not promulgated by the sovereign direct, but indirectly by a judge, or by the sovereign as a judge.

In the present connection the first two need to be noticed.

(1) *What are the marks of a general custom?* As the name implies it must be a custom prevailing over the land. It must also be "immemorial," beyond the memory of living men. There are two other marks which Blackstone indicates negatively thus: the judge makes new law "where the former determination is most evidently contrary to reason: much more if it be clearly contrary to the divine law." But general customs came into English law through the collections of "Dooms" by Ethelbert (*c.* 600 A.D.), Ine of Wessex (*c.* 690), by Edward the Confessor, and by Alfred (*c.* 900) and others: and then especially by Henry II., who developed the central justice of the Curia Regis. The rules of the King's Court were the foundation of the Common Law, taking over laws (or customs) common to Wessex law, Mercian law, and Dane law.

Glanville, Chief Justiciar in 1180, tells of the law administered in the King's Court; and Bracton (*q*) described that law. Bracton's *Note Book* contained rescripts of the rolls of the King's Court from 1218. The kings sent royal judges on circuit, and these, by selection and rejection, gathered the universal and immemorial customs, making them the laws of the King's Court, instead of merely the customs of

(*q*) *De legibus et consuetudinis Angliae* (*c.* 1268).

the manorial courts (viz., the Court leet for crimes, and the Court baron, which was for civil cases and not a court of record). The Common Law was not written down, but "in gremio judicum," *e.g.*, as to "bot" and "wer" and "wite" (the last being a payment to the king). The Common Law was of general customs which were not so much made as *discovered*, and equitable rules arose, as Prof. Maitland said, as a loosely-knit collection of appendixes to the Common Law.

(2) *What were the marks of a particular or local custom*, such as gavelkind (in Kent) or borough English (in the district of Nottingham), or trade usages in various localities?

Local customs remained after the general universal customs had been gathered and recognised by the king's justices. Evidently for such local customs to be enforced by the State, they must be clear and certain, also reasonable and immemorial, and not contradictory to other laws. Indeed, the following were said by Blackstone to be the marks of a particular custom:

(a) Immemorial;
(b) Reasonable;
(c) Continuous (uninterrupted);
(d) Peaceable (not disputed);
(e) Certain or clear;
(f) Compulsory, not optional;
(g) Consistent with the rest of recognised customs;

(h) If allowed against the Common Law, they must receive a strict construction. (This is disputed by some.)

(i) Not against an Act of Parliament.

The book *Doctor and Student* adds another mark, viz.:

(k) The custom must not be against the law of God.

If a particular custom in a State bear these marks, it will be recognised by the judge. The custom is, in a sense, *already* law, because it is custom with such characteristics that (if occasion arise) it will be enforced by the State. Some customs in a State are already law, tacitly agreed to by the sovereign already, because of their bearing certain marks. *This is the relation of custom to law.*

In connection with particular or local customs, it is necessary to make clear what some of their marks involve. (The marks of the universal customs of merchants will be considered separately.)

(a) *Immemorial.*

The period of legal memory was first fixed (*r*) as 1189, the accession of Richard I. Bracton, in the reign of Henry III. declared (*s*) that some

(*r*) Statute of Westminster, 1275.

(*s*) *De legibus regni Angliae et consuetudine*, I. 1. par. 2. and I. 3. par. 2.

customs have "the force of law" (legis vigorem) being approved of the king, and one of the tests of such was that it was ancient: "Longaevi usus et consuetudinis non est vilis auctoritas" (*t*).

Coke in his *Institutes* (*u*) quotes these passages from Bracton, and adds: "Of every custome there be two essential parts, time and usage: time out of mind, and continuall and peaceable usage without lawful interruption," *i.e.* there must be "no memorie of man to the contrarie."

Thus, a liability to repair a sea wall, though submitted to only since 1818, was yet presumed to have a legal origin (*x*). In *The Attorney-General* v. *Wright* (*y*) the custom to moor vessels in a navigable tidal estuary of the River Thames by beams buried in the foreshore was recognised and enforced. The action was brought in the name of the Attorney-General at the relation of a number of fishermen and yacht-owners, claiming an injunction restraining the defendant from interfering with their moorings, and from casting adrift their craft, at Leigh on the River Thames. The defendant said that the digging of the foreshore and placing in it baulks of timber to attach chains to them was a trespass which he had the right to abate. So he had cut certain of the

(*t*) Compare the Code of Justinian, VIII. 52. 2.

(*u*) I. 110 *b*.

(*x*) *L. & N. W. Ry.* v. *Fobbing Levels Commissioners*, 66 L. J. Q. B. 127.

(*y*) 66 L. J. Q. B. 834; (1897) 2 Q. B. 318.

craft adrift. The jury found an immemorial user by all parties navigating the waters at Leigh. Judge Cave granted the injunction. An appeal was dismissed.

In *Whitstable Free Fishers* v. *Foreman* (*z*) the owners of an anchorage ground at Whitstable had received dues from all vessels anchoring there time out of mind: they maintained the buoys and beacons as a consideration for such dues. The custom was upheld and enforced.

In the case of *Dalton* v. *Angus* (1881) (*a*), the plaintiff's right to lateral support, from adjoining land, for a building was upheld, since he had enjoyed it for more than twenty years uninterruptedly. A *prescriptive* right to lateral support for a building was thus upheld. The following judges were present: Pollock, B., Field, J., Lindley, J., Manisty, J., Lopes, J., Fry, J., and Bowen, J.

Lord Blackburn (*b*) said that Lord Coke had stated that two things were required to make prescription, viz., possession and time. Possession must be "long, continual and peaceable." "As to 'long,' it is the time given by law, which in England is the time whereof there is no memory of man to the contrary: The time was fixed by the Statute of Westminster (A.D. 1275), to be from 1189 (Richard I.)." This, when first

(*z*) 36 L. J. C. P. 273.
(*a*) 6 App. Cas., pp. 740-832.
(*b*) *Idem*, pp. 808-812.

introduced, gave a prescription of about eighty-six years, but it later became too long a period, and now twenty years' uninterrupted possession is considered enough to presume a grant, though none really existed. It is a legal "fiction."

(b) *Reasonable.*

Coke declared that "a custome against reason is void" (*c*). In *Wigglesworth* v. *Dallison* (1778) (*d*) Lord Mansfield declared that for a sub-lessee to take a crop which he had sown soon before his lease expired was a reasonable custom, for "he who sows should reap." Reasonableness was asserted to exist in the case of a custom to erect a booth or stall in the period of a fair or market (*e*); also in a case of a custom for a town crier to have exclusive right to proclaim by bell the sale of goods brought into a town to be sold by auction (*f*); also for the inhabitants of a parish to erect a may-pole on the ground of a landowner in the parish (*g*); also to enter a close for horse-racing one day a year (*h*); but not for any inhabitants to take a profit *in alieno solo*, as a prescription is needed for that (*i*).

(*c*) I. 59 *b*, 69 *a*.
(*d*) 1 Sm. L. C. (11th ed.), 545.
(*e*) *Elwood* v. *Bullock*, 6 Q. B. 383.
(*f*) *Jones* v. *Waters*, 1 C. M. & R. 713.
(*g*) *Hall* v. *Nottingham*, 45 L. J. Ex. 50.
(*h*) *Mounsey* v. *Ismay*, 1 H. & C. 729.
(*i*) *Grimstead* v. *Marlowe*, 4 Term. Rep. 717.

To take water from a well may be good as an easement, and not a profit *à prendre* (*k*).

To take shingle for repairing a highway is a bad custom, being a claim to a profit *à prendre, in alieno solo* (*l*). A custom for any one to glean is not a reasonable custom (*m*): so also a custom for any person to carry away boughs (*n*).

A case of special interest on this point is the *Tanistry Case* (*o*).

Tanistry was a local custom in Ireland, that "when any person died seised of any castles, manors, lands or tenements, such should descend, 'seniori et dignissimo viro sanguinis et cognominis,' of such person who so died seised; and daughters were excluded."

The query was: Was the custom of tanistry abolished by the common law of England, as introduced into Ireland?

The counsel of the plaintiff said: "Three things ought to concur to make a custom good—antiquity, continuance, and reason"; which he declared all concurred in this case.

The counsel of the defendant said: "Custom is *jus non scriptum*, and made by the people in

(*k*) *Race* v. *Ward*, 4 El. & Bl. 702.
(*l*) *Pitts* v. *Kingsbridge Highway Board*, 25 L. T. 195.
(*m*) *Steel* v. *Houghton*, 1 H. Bl. 51.
(*n*) *Selby* v. *Robinson*, 2 Term Rep. 758.
(*o*) Reported in Sir John Davies' little book, *A Report of Cases and Matters in Law resolved and adjudged in the King's Court in Ireland* (Dublin, 1762). The case of tanistry (1608) is reported on pp. 78-115.

respect of the place where the custom obtains. For where the people find any act to be good and beneficial, and apt and agreeable to their nature and disposition, they use and practise it from time to time, and it is by frequent iteration and multiplication of this act that the custom is made, and, being used from a time to which memory runneth not to the contrary, obtains the force of law (vim legis). Custom ought to have four inseparable qualities: it ought to have a reasonable commencement: it ought to be certain, and not ambiguous (et certa causa): it ought to have an uninterrupted continuance, time out of mind: and it ought to be submitted to the prerogative of the King, and not exalted above it, for nullum tempus occurrit regi."

It was decided that the custom of tanistry was unreasonable, and the estate *uncertain*. But "every custom is not unreasonable that is contrary to a particular rule or maxim of positive law: as gavelkind and borough English are against the rule of the descent of inheritance": so to dry nets on the land of another may not be unreasonable because it may be necessary for fishing locally.

A custom is void which is unreasonable, such as one which tends to make the lord of a manor a judge in his own cause (*p*).

A prescription to take three bushels of barley

(*p*) *Wilkes* v. *Broadbent*, 1 Wils. 63.

out of every ship's cargo brought to a certain quay to be exported is reasonable (*q*).

A custom that every pound of butter sold in a certain town should weigh eighteen ounces is bad (*r*).

A marriage fee cannot be claimed by any statute, but if it be a reasonable amount it may be due by custom, especially if it has been also received beyond the legal memory (*s*).

For any tinner in Cornwall to acquire a right to tin he finds, if he render a portion to the owner of the soil, is unreasonable (*t*).

In *Tyson* v. *Smith* (1837) (*u*) it was held that the custom was reasonable that, at a fair on some part of the common or waste land of a manor, named by the lord, every liege subject exercising the trade of a victualler might enter at the time of the fair and erect a booth, paying twopence to the lord. Such a small sum may have been ample when the custom began. The apprehension that too many victuallers would come was not worthy of attention.

A custom to erect a booth or stall at a fair or market, if leaving sufficient room for the public to pass, is a good custom (*x*).

(*q*) *Serjeant* v. *Read*, 1 Wils. 91.
(*r*) *Noble* v. *Durell*, 3 Term Rep. 271.
(*s*) *Bryant* v. *Foot*, 9 B. & S. 444; *Sheppard* v. *Payne*, 12 C. B. (N. S.) 144.
(*t*) *Rogers* v. *Brenton*, 10 Q. B. 26.
(*u*) In Ad. & El., vol. VI. (1838), pp. 745-752.
(*x*) *Elwood* v. *Bullock*, 6 Q. B. 383.

The custom for all inhabitants of a parish to play games in a private close is good, but this does not extend to all persons who happen to be in the parish for a short time (*y*).

The custom for the inhabitants of a parish to exercise and train horses on land beyond the limits of the parish is unreasonable and cannot be upheld (*z*).

The first two marks were thus clearly established, viz., that a particular custom be:

(a) Immemorial (*a*).
(b) Reasonable (*b*). The other marks are:
(c) Continuous (*c*), *i.e.* without interruption.
(d) Peaceable, *i.e.* undisputed.
(e) Certain or clear (*d*), such as to pay twopence an acre instead of tithes.
(f) Compulsory (*e*), which mark would not exist where, *e.g.*, "all should contribute according to their pleasure."
(g) Consistent with other customs now in the Common Law (*f*).

(*y*) *Fitch* v. *Rawling*, 2 H. Bl. 393.
(*z*) *Sowerby* v. *Coleman*, 36 L. J. Ex. 57.
(*a*) *Jenkins* v. *Harvey* (1835), 1 Cr. M. & R. 877; *Bastard* v. *Smith* (1837), 2 Mood. & R. 129, *per* Tindal, C.J., at p. 136.
(*b*) *Sowerby* v. *Coleman* (1867), L. R. 2 Ex. 96.
(*c*) *Simpson* v. *Wells* (1872), L. R. 7 Q. B. 214.
(*d*) *Blewett* v. *Tregonning* (1835), 3 A. & E. 554; *Tyson* v. *Smith* (1838), 9 Ad. & El. 406; Ex. Ch., at p. 421.
(*e*) "Opinio necessitatis": *cf.* Suarez, *De Legibus*, VII. 14. 7. The rule must not be optional.
(*f*) *Blewett* v. *Tregonning*, 3 A. & E. 554.

(h) If against the Common Law (*g*) the said custom must receive a *strict construction.* "Thus by the custom of gavelkind an infant of fifteen years may, by one species of conveyance (called a deed of feoffment), convey away his lands in fee-simple or for ever. Yet this custom does not empower him to use any other conveyance, or even to lease them for seven years: for the custom must be strictly pursued" (*h*).

But Sir Edward Coke said otherwise:
"That if there be a custom within a manor that copyhold lands may be granted in fee-simple, by the same custom they may be granted in tail for life, for years, or any other extent" (*i*).

(i) *Not against an Act of Parliament.*
Particular customs might be contrary to the common law, but not to an Act of Parliament. (Roman Law recognised that a custom should abrogate and end a *lex* "per desuetudinem.")

(k) *Not against Divine law.*
Doctor and Student said: "If any cus-

(*g*) *Horton* v. *Beckman*, 6 Term Rep. 760, 764.
(*h*) Blackstone, *Commentaries*, Intro. par. 3.
(*i*) *Stewart on Blackstone*, I. 78.

tom were directly against the law of God, the custom was void" (*k*).

Customs of the City of London are certified by the recorder (*l*).

In London, if a person has occasion to erect or pull down a building near a public way, and desires to erect a hoarding which may enclose part of the said public way, the lord mayor can licence him so to do. Such is a reasonable custom (*m*).

No municipal corporation but that of London can appoint an attorney except under the corporate seal (*n*).

In London, a wholesale warehouse used as a shop, with glazed windows, and articles exposed for sale, is a market overt, even though it be not open to the street (*o*).

Particular mercantile usages must be proved by instances, and not by opinion merely (*p*).

A usage of a trade cannot be set up against an express contract (*q*).

If there be a usage in a particular trade or profession, persons employing any one in such

(*k*) I. 6.
(*l*) *Hartop* v. *Hoare*, 1 Wils. 8.
(*m*) *Bradbee* v. *Christ's Hospital*, 2 D. (N. S.) 164.
(*n*) *Arnold* v. *Poole Corporation*, 4 Man. & G. 860.
(*o*) *Lyons* v. *Depass*, 3 P. & D. 177.
(*p*) *Cunningham* v. *Foublanque*, 6 Car. & P. 44.
(*q*) *Yates* v. *Pym*, 6 Taunt. 446.

trade or profession shall be taken to have dealt with him according to that usage (*r*).

A custom of Liverpool corn market, that, when corn is sold by sample, if the buyer does not, on the day the corn is sold, examine the bulk and reject it, he cannot later refuse to pay the price, is a reasonable custom (*s*).

Of Scottish law it is said:

"Our unwritten or customary law is that which, without being expressly enacted by statute, derives its force from the *tacit consent* of King and People, which consent is presumed from the *ancient* custom of the community—as the laws of primogeniture and succession, the legitim, terce, courtesy, along with the law merchant, much of which is of very recent origin. It is usual to bestow on these customs when, *and only when*, recognised in a competent court, the name of the 'common law.' A local custom will not be recognised as law, unless in the opinion of the Court it is just and reasonable" (*t*).

The passage is not quite clear, but it allows that "tacit consent" of King and People may make a custom to be a law, *even before* it is publicly recognised as part of the common law. But the tacit consent only exists if the custom be ancient and reasonable, except in the case of the law merchant, which need not be ancient.

(*r*) *Sewell* v. *Cerp*, 1 Car. & P. 392.
(*s*) *Sanders* v. *Jameson*, 2 Car. & K. 557.
(*t*) John Erskine, *Principles of the Law of Scotland*, p. 7.

(c) SOME CUSTOMS OF WALES RECOGNISED AS LAW BY THE ENGLISH.

Wales was annexed to England by Edward I. (1282). But those Welsh customs which had acquired certain marks had to be recognised by English kings as law in that land. The "Statute of Wales" could not impose English Law suddenly on that land. Thus Mr. F. Seebohm, in *The Tribal System of Wales* (*u*), tells how "The surveys have made it clear that upon the conquest of North Wales there was existent, and inextricably interwoven into Welsh polity, a mass of tribal custom, which even Norman phraseology and classification could neither force into ordinary manorial grooves *nor ignore.*" Such custom was "the result of immemorial usage. Long generations of Christian influence failed to Christianise the tribal law of marriage, *e.g.* so as to disinherit illegitimate sons. So Edward I., in the final conquest, could not force upon the Welsh tribesmen the law of primogeniture."

Howel the Good had made a collection or Code of the laws and customs of Wales in 940 A.D., and such were obeyed till the Welsh received the laws of England in the days of Edward I. and Edward II. But these kings had to recognise as law certain customs of Wales.

(*u*) pp. 51, 52.

In the Statute of Wales it was said concerning gavelkind: "Whereas the custom is otherwise in Wales than in England concerning succession to an inheritance, inasmuch as the inheritance is partible among the heirs male, and, from time whereof the memory of man is not to the contrary, hath been partible, our Lord the King will not have that custom abrogated."

So also it was declared "that the custom which is called Amobragium (*x*) henceforth be not exacted *except* within a year from the time of the offence in respect of which the said custom ought to be paid becoming known."

Petitions concerning this custom had been presented, and the English kings practically were bound to make some allowance of this custom in order to keep the peace.

So also with regard to the custom Blodwyte. It was allowed when the "shedding of blood be lawfully ascertained by our bailiffs, or by inquisition."

So with the custom called taking "Westra," a cow being paid to the King for food for himself and his retinue, it was also allowed.

In the fourteenth century English traders and settlers oppressed the Welsh. Norman castles were rebuilt to keep down the native Welsh. Acts were passed which were practically coercive

(*x*) A fee paid to the lord by the tenant on the marriage of the latter's daughter.

measures. Thus it was that Henry VIII., in 1542-1543, was able to enact (*y*) that the Common Law of the Realm of England, in regard to primogeniture, apply to Wales, and not "the custom of gavelkind as heretofore in divers parts of Wales hath been used and accustomed."

The history of Wales thus illustrates the truth that a sovereign is not omnipotent. To rule he *must* recognise customs which are held sacred or essential to a people's welfare. If the customs have certain marks of practical utility—as reasonable and ancient and clear—they must needs be ratified as part of the law of the State: for the State must keep the peace.

(d) SOME CUSTOMS OF INDIA RECOGNISED AS LAW BY THE ENGLISH.

Sir Henry Maine pointed out (*z*) that for centuries, in the village communities of India, those quiet agricultural peoples, led by their Brahmin priests, had discussed and obeyed their native customs in regard to such matters as the holding of land, and succession, and adoption of sons. The English brought in the idea of a State and its penalties. Before they came, the only sanction was social opprobrium, or a boycott of an offender, at most.

(*y*) 34 & 35 Hen. VIII. c. 26.
(*z*) *Village Communities*, p. 45.

The element of force changed the life of India. Maine sought to urge that Indian custom was law before the English recognised it, since it was obeyed and sanctioned by social means without force. So the Code of Manu said: "Immemorial custom is transcendent law: law is grounded on immemorial custom" (*a*).

John D. Mayne (*b*) has pointed out that the English Judicial Committee, in the *Ramnad Case*, said "Under the Hindu system of law clear proof of usage will outweigh the written text of the law." So Austin's view that a custom is never binding till some act of the judge has made it law cannot now be sustained.

Sir Henry Maine did not distinguish clearly between customs which the State (when formed) would recognise as law, and customs which had not attained certain marks and would not be so recognised. It is in this distinction that the whole solution of the confusion is to be found. Not all customs are laws. None are laws till a State has been set up. Then those customs which *will be* recognised are already laws. The others are not laws. Thus the High Court of Madras declared (*c*):

"What the law requires before an alleged custom can receive the recognition of the Court,

(*a*) *Manu*, I. pars. 108, 110.

(*b*) *Hindu Law and Custom* (1914, Madras), pp. 48, 57.

(*c*) *Swananja* v. *Muttu Ramalinga*, 3 Mad. H. C. 75, 77; affirmed on appeal.

and so acquire legal force, is satisfactory proof of usage, so long, and invariably acted on in practice, as to show that it has, by common consent, been submitted to as the established governing rule of the particular family, class or district or country, and the course of practice upon which the custom rests must not be left in doubt, but be proved with certainty."

Thus, the English judge in India will recognise a custom as law if it be immemorial, invariable, certain, clear, undisputed, and moral.

But not every custom is recognised: *e.g.* a caste custom authorising a woman to abandon her husband, and marry again without his consent, would be void for immorality.

(e) "THE INSTITUTES OF THE LAWS OF HOLLAND," by Linden,

set out the nature of custom there thus: "The custom must be founded on good *reason*, otherwise it is justly regarded as a corruption, which, so far from possessing the force of law, must be rejected. It must be properly proved, *i.e.* by a number of witnesses, and by an *unbroken* series of decisions on the custom in question. A custom clothed with these requisites is not only of force in cases wherein the written or statute law fails, but has even this force, that it can repeal a written law" (*d*).

(*d*) Linden, *The Institutes of the Laws of Holland* (1828), pp. 63, 64.

(f) THE RECOGNITION OF THE GENERAL MERCANTILE CUSTOMS AS THE LAW MERCHANT.

The judges have recognised the law merchant (*lex mercatoria*). Thus Hobart, C.J., in *Vanheath* v. *Turner* (*e*), said:

"The custom of merchants is part of the common law of this kingdom of which the judges ought to take notice."

So also in *Mogadara* v. *Holt* (*f*).

"The law of merchants is *jus gentium*, and the judges are bound to take notice of it."

Holt, C.J., in *Lethulier's Case* (*g*), declared, "We take notice of the laws of merchants that are general, but not of those that are particular usages."

The law merchant existed in the fourteenth century as a shipping and market law. It was established in England through the Guilds. The Admiralty Court used it in regard to marine insurance. From the fifteenth century onward it became part of the common law of the Courts. *Some* customs were recognised as law, others were left aside. One of the marks which a custom of merchants needed to possess was universality; a merely local usage was not law.

The law merchant need not be ancient, and it is not stereotyped and complete. The custom of

(*e*) Winch, 24. (*f*) Shaw, 318.
(*g*) 1 Salk. 443.

merchants is law if it will be recognised by the Courts. It is "neither more nor less than the usages of merchants and traders, ratified by the decisions of courts of law, which, upon such usages being proved before them, have adopted them as settled law" (*h*).

The point to notice in regard to the law merchant is that *it is not fixed: a recently formed usage* can be recognised as part of the law merchant. The custom need not be "ancient" in order to be ratified by a judge.

Thus "it was long doubtful" (*i*) as to whether an English company could issue debentures or securities under seal purporting to be negotiable. The question was raised in 1873 in the case of *Crouch* v. *Crédit Foncier of England, Lim.* (*k*). The English company's debenture, payable to bearer, was held to be not negotiable here, because it was of recent origin. It was not "ancient," "immemorial."

This was soon challenged in the case of *Goodwin* v. *Robarts* in 1875 (*l*), distinguishing *Crouch* v. *Crédit Foncier, Lim.* A general usage can arise, though it be of recent growth, and so an instrument may become negotiable and part of the law merchant, even if it has not long been in use. This was settled in the important case of

(*h*) *Goodwin* v. *Robarts* (1875), L. R. 10 Ex. 76.
(*i*) *Byles on Bills of Exchange*, p. 86 *seq.*
(*k*) L. R. 8 Q. B. 374.
(*l*) L. R. 10 Ex. 76.

The Bechuanaland Exploration Co. v. *London Trading Bank* (1898) (*m*).

In this case the turning point of the whole question was reached, so far as it concerned the recognition of a *recently-formed custom*. The plaintiffs had debentures of the Beira Junction Railway Co., Lim., issued by an English company in England, and payable to bearer. Evans, the secretary of the plaintiffs, took the debentures from the safe and pledged them to the defendants (a banking company) for a loan. It was held that the defendants were entitled to the debentures, for they were negotiable instruments transferable by delivery, and received by the defendants in good faith. The debentures commenced in this form:

"[1895] Debenture No. —. The Beira Junction Railway (Port Beira to Fontesville), Limited, hereinafter called the Company, will on the 1st day of July 1925 or on such earlier day as the principal moneys hereby secured become payable in accordance with the conditions indorsed hereon, pay to the *bearer*, or when registered, to the registered holder for the time being hereof, *on presentation* of this debenture, the sum of one hundred pounds."

The defendants proved the usage of merchants that negotiability attached to documents other than bills of exchange and promissory notes.

(*m*) 2 Q. B. 658.

Three gentlemen of London banks and the secretary of the London Stock Exchange proved in Court the usage, in the case of a long list of companies issuing debentures to bearer, and for at least *ten years* such were treated as negotiable, like bills of exchange and promissory notes. Kennedy, J., then said: "Assuming the usage (or custom) proved in the present case, I have to say whether, in my judgment, I ought to give effect to it." The "effect" the judge called "legal ratification." He then proceeded to examine the case of *Crouch* v. *Crédit Foncier of England, Lim.*, and *Goodwin* v. *Robarts*, and found them irreconcilable. The former was overruled, and the judge gave judgment for the defendants with costs.

Thus a custom of merchants, if it be general and certain and undisputed and reasonable (such must be its marks), is law in England even before it be recognised, for it will be recognised. Its legal ratification will be retrospective, and uphold a past act taking place before the custom was actually recognised by the judge. The defendants, in this case, were in legal possession of the debentures before the trial, and were so because the custom had certain marks, as above indicated.

So in *Edelstein* v. *Schuler and others* (1902) (*n*), Mr. Justice Bigham said:

(*n*) 2 K. B. 144.

"This was an action in trover to recover the value of certain bearer bonds—De Beers Mining Co., Denver Railway Co., Mexican Railway Co., Union Pacific Railway Co.—all bonds of foreign corporations—also of Bechuanaland Railway Co., an English company registered under the Companies Act. The plaintiff kept them in a safe whence a clerk stole them, and employed a broker to sell them, through the defendants' stock-brokers, who had no notice of any infirmity of the vendor's title. The evidence is that these bonds are treated as negotiable like the bonds of foreign governments. I am satisfied that brokers, rightly or wrongly, treat them as negotiable, as passing from hand to hand by mere delivery. The plaintiff says they are not in law negotiable, because these bonds are of such *recent* creation that their negotiability under the law merchant cannot be justified. It is no doubt true that negotiability can only be attached to a contract by the law merchant, or by a statute: and it is also true that, in determining whether a usage has become so well established as to be binding on the Courts of law, the length of time during which the usage has existed is an important circumstance to take into consideration. But it is to be remembered that *in these days usage is much more quickly established* than it was in days gone by: more depends on the number of transactions which help to create it than on the time over which the transactions are spread: and now there are more

business transactions in an hour than there were in a week a century ago. So there is no difficulty in holding that they are negotiable by virtue of the law merchant. It is also to be remembered that the law merchant is not fixed and stereotyped: it has not yet been arrested in its growth by being moulded into a code: it is, to use the words of Lord Chief Justice Cockburn in *Goodwin* v. *Robarts*, capable of being expanded and enlarged to meet the wants of trade" (*o*).

Thus a general custom of merchants need not have the mark of being "immemorial," in order for it to be recognised as law in English Courts.

(g) INTERNATIONAL LAW AS CONTAINING CUSTOMS WHICH BECOME PART OF THE LAW OF THE LAND IF RATIFIED.

Judge Gray, in "*The Paquete Habana*" (1899) (*p*), declared that International Law was part of the law of U.S.A., and had to be sought out. "International Law is part of our law, and it must be ascertained and administered."

The view in England is not, however, exactly that. In *The West Rand Central Gold Mining Co., Lim.* v. *Regem* (1905) (*q*), Lord Alverstone said: "That to which we have *assented*, along with other nations, in general may properly be

(*o*) *The Times* (Law Report), May 10, 1902.
(*p*) 175 U. S. 677.
(*q*) 2 K. B. D. 391; 74 L. J. K. B. 753.

called international law, and as such will be acknowledged and applied by our municipal tribunals. The international law must be shown to have been recognised by our country or to be so *widely and generally accepted* that it can hardly be supposed that any civilised State would repudiate it."

Thus, though Lord Alverstone declared that England must have "assented" to a rule for it to be binding here, yet he acknowledged that such assent is implied where the rule is very "widely and generally accepted." That is, certain customs among nations gain the mark of universality by which they are law for England even before they are openly recognised by a Court.

So in the recent "*Zamora*" *Case* (*r*), the late Sir Samuel Evans said:

"A Court must take its law from the authority under which it sits, and for a Court of Admiralty that authority has never been any other than that of its own country. It must apply any rules which it finds to be *generally agreed on*, a condition which involves the agreement of its *own* country with them." Further, he declared that where there is no general agreement, and the supreme authority in the State has not taken a decided line, the Court must take that line which justice appears to it to require.

(*r*) *Prize Cases*, Reports by E. C. M. Trehern, Part 3, pp. 330, 331 (1916-1917).

The "*Zamora*" judgment in the Appeal Case (April 7, 1916) showed that neither the Cabinet nor the Foreign Office can alter the Law of Nations. The series of Orders in Council and Proclamations cannot be dictated to the Court of Admiralty. Lord Stowell said similar words in the cases of the "*Maria*," "*Recovery*," and "*Fox*."

Lord Parker, in the "*Zamora*" *Case*, pointed out that "the law which the Prize Court is to administer is not the national or municipal law, but the law of nations, international law, not laid down by any particular State, but by *usage long observed*."

* * * * * *

The conclusion is that customs, by repetition, or by declarations of popular authorities, often acquire certain *marks* (such as ancient, reasonable, certain, continuous, undisputed). When the society in which such customs exist becomes a *State*, with a central coercive authority, such customs as have certain marks *become at once law*, because they *will be* recognised as law, should occasion require. They will *need* to be so recognised (or ratified) because the people hold them as sacred or necessary to their lives, and for a judge to refuse recognition would endanger the peace. The marks which change customs to law in a State vary in regard to general customs, particular local customs, customs of merchants

over the world, and international customs: but in each case the marks are such as make it *practically binding* on the judge to recognise any custom when a case arises involving the said custom. Customs in a primitive society without any central coercive authority are not laws, but customs in a State which, because of certain marks, will be recognised by a judge, are not only customs, but are also laws already.

The Eastern Press, Ltd., London and Reading.